

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TERESA ROMERO, individually and as
Special Administrator of the Estate of
ADAN ADRIAN MADRID,

Plaintiffs,

v.

MAITE AU QUIROGA, et al.,

Defendants.

Case No. 2:11-cv-00755-MMD-GWF

ORDER

I. SUMMARY

Before the Court is Plaintiff's Third Amended Application for Default Judgment Against Defendant Maite Au Quiroga ("the Motion"). (Dkt. no. 84.) For the reasons discussed herein, the Motion is denied.

II. BACKGROUND

The Complaint arises from the tragic death of Plaintiff's minor child while he was residing in the foster home of Defendant, who at the time was a licensed foster parent. The Complaint asserts claims against County of Clark and other County related parties ("Clark County Defendants"), who are not the subject of the Motion, based on their alleged failures and deliberate decisions relating to the foster care program in general and the wrongful death of Plaintiff's minor child in particular. Plaintiff ultimately settled her claims with the Clark County Defendants with Clark County agreeing to pay \$46,600.00. (Dkt. no. 70-1.) The Court approved this settlement. (Dkt. no. 75.)

1 Plaintiff asserts a single claim for negligence against Defendant. The allegations
2 against Defendant are essentially found in three paragraphs of the Complaint:

3 68. Defendant MAITE AU QUIROGA owed a duty to act with
4 reasonable care in maintaining a home for ADAN ADRIAN MADRID and
acting as foster parent for him at the direction of the County Defendants.

5 69. Defendant MAITE AU QUIROGA breached this duty of care
6 owed to Plaintiffs by failing to ensure that ADAN ADRIAN MADRID was
7 kept in an environment safe and secure for a child of his age, so that he
could be returned to his mother pursuant to reunification efforts that should
have been conducted by DFS and its caseworkers.

8 70. As a result of the named Defendants' breach, ADAN ADRIAN
9 MADRID is dead, thus depriving Plaintiffs of their familial association with
10 each other and causing ADAN ADRIAN MADRID to sustain severe terror,
pain and suffering, mental injuries, severe mental anguish and death,
suffering damages in excess of \$10,00.00.

11 (Compl. at 14, dkt. no. 84-5.¹)

12 The Complaint does not offer specific allegations relating to the circumstances
13 that led to the death of Plaintiff's minor child. In support of the Motion, Plaintiff submitted
14 her Affidavit where she describes the circumstances that led to her son's death:

15 3. It is my understanding that on May 26, 2009, Ms. Quiroga left
16 Adan, age 3, alone and unsupervised in a bedroom. That bedroom also
17 contained a clear plastic bag, which my young child somehow placed over
his head. He apparently suffocated due to the plastic bag cutting off his
airflow, and he was discovered about an hour later.

18 (Dkt. no. 84-2 at ¶ 3.)

19 Defendant was served with the Summons and Complaint on April 5, 2011. (Dkt.
20 no. 12.) On June 8, 2011, Defendant submitted a letter to the Court explaining that she
21 cannot respond to the Complaint due to her personal circumstances. (Dkt. no. 10.) The
22 Clerk entered default on June 21, 2011. (Dkt. no. 13.) To date, Defendant has not
23 responded to the Complaint or otherwise appeared.

24 The Court had previously denied Plaintiff's second motion for default judgment for
25 failure to file points and authorities in support of her motion in compliance with Local
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27 ¹The Complaint attached to the Petition for Removal (dkt. no. 1) is missing page
28 14. Thus, the Court refers to the copy of the Complaint attached to the Motion. (Dkt. no.
84-5.)

1 Rule 7-2(d) or address the legal standard governing default judgment. The Court granted
2 Plaintiff leave to refile her request to address these deficiencies. However, Plaintiff's
3 Motion continues to be deficient.

4 **III. DISCUSSION**

5 Obtaining a default judgment is a two-step process governed by the Federal
6 Rules of Civil Procedure. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First,
7 "[w]hen a party against whom a judgment for affirmative relief is sought has failed to
8 plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk
9 must enter the party's default." Fed. R. Civ. P. 55(a). Second, after the clerk enters
10 default, a party must seek entry of default judgment under Rule 55(b).

11 Upon entry of default, the court takes the factual allegations in the non-defaulting
12 party's complaint as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th
13 Cir. 1987) (citation omitted). Nonetheless, although entry of default by the clerk is a
14 prerequisite to an entry of default judgment, "a plaintiff who obtains an entry of default is
15 not entitled to default judgment as a matter of right." *Warner Bros. Entm't Inc. v. Caridi*,
16 346 F. Supp. 2d 1068, 1071 (C.D. Cal. 2004) (citation omitted). Instead, whether a court
17 will grant a default judgment is in the court's discretion. *Id.*

18 The Ninth Circuit has identified the following factors as relevant to the exercise of
19 the court's discretion in determining whether to grant default judgment: (1) the possibility
20 of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claims; (3) the
21 sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the
22 possibility of a dispute concerning material facts; (6) whether the default was due to the
23 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
24 Procedure favoring decisions on the merits. *Eitel*, 782 F.2d at 1471-72.

25 Plaintiff has satisfied the procedural requirements for default judgment pursuant to
26 Fed. R. Civ. P. 55(b). The Clerk properly entered a default against Defendant pursuant
27 to Fed. R. Civ. P. 55(a). (Dkt. no. 13.) Insofar as Defendant has not answered or
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1 otherwise responded to the Complaint, the notice requirement of Rule 55(b)(2) is not
2 implicated. Thus, there is no procedural impediment to entering a default judgment.

3 There are, however, substantial deficiencies in the *Eitel* factors that affect the
4 Court's exercise of discretion. The Court first notes that Plaintiff did satisfy several *Eitel*
5 factors. There is a possibility of prejudice to Plaintiff if default judgment is denied,
6 particularly when there is no evidence that the default was due to Defendant's excusable
7 neglect. Defendant is aware of this action as evidenced by her letter to the Court so any
8 possibility of excusable neglect is negligible. There is also no possibility of a dispute
9 concerning a material fact because the Court must accept the allegations in the
10 Complaint as true, although the Court does not find negligence liability based on the
11 scant records presented.

12 However, Plaintiff's Motion does not address the merits of her negligence claim
13 and the sufficiency of the Complaint in any meaningful way. She repeats the general
14 allegations that, as a foster parent, Defendant "has duty to act with reasonable care in
15 maintaining a home" and Defendant breached this duty because "she did not act with
16 reasonable care in maintaining such a home." (Dkt. no. 84 at 4.) Plaintiff offers no legal
17 authority to support her claim that a foster parent owes the duty of reasonable care that
18 she is seeking to impose and does not explain how that duty was breached. While
19 Plaintiff does allege that the minor child died from suffocation while in Defendant's care,
20 this allegation is not sufficient for the Court to impose negligence liability on the foster
21 parent. Plaintiff's Motion raises questions as to liability, such as whether Nevada law
22 imposes negligence liability on a licensed foster parent and how Defendant failed to act
23 responsibly in supervising the minor child. Plaintiff's Affidavit shows that she lacks
24 personal knowledge as to the circumstances that led to the child's death. Plaintiff also
25 offers no evidence or records, such as that which would have been produced as part of
26 the investigation into the incident, to support her allegations.

27 The allegations in the Complaint are not sufficient to establish negligence liability
28 against Defendant. The specific allegations against Defendant consist of three

1 paragraphs that contain general recitations of the elements of a negligence claim. While
2 Defendant is mentioned several times in the paragraphs under the "General Allegations,"
3 this was in reference to the Clark County Defendants' conduct (i.e., Defendant was able
4 to violate statutes and administrative codes because the minor child did not receive
5 required visits by the case worker, or the minor child was deprived of basic human needs
6 while in Defendant's care because Clark County Defendants acted with deliberate
7 indifference). (Compl. at 7-8.) Indeed, it is not clear from the Complaint what happened
8 that led to the minor child's death and what Defendant allegedly did or failed to do.

9 The Court is required to consider the sum of money at stake in relation to the
10 seriousness of Defendant's conduct. However, Plaintiff does not offer a consistent
11 reason to support her claim for \$350,000.00 in damages against Defendant Quiroga.
12 The Motion relies on a formula based on future lost earnings while Plaintiff's Affidavit
13 explains that the basis for the damage calculation is her understanding that similar cases
14 have settled for approximately \$350,000.00. It is not clear from the Motion or Affidavit
15 whether these cases involved payments by the responsible agency or the foster parent.
16 Moreover, Plaintiff does not explain the significant gap between the settlement amount
17 from Clark County Defendants (\$46,000.00) and the amount she seeks from Defendant
18 Quiroga (\$350,000.00), particularly when the majority of the allegations and claims in the
19 Complaint are directed against Clark County Defendants. Based on the evidence
20 presented, the Court cannot conclude that Plaintiff has established that she is entitled to
21 recover damages against Defendant Quiroga for \$350,000.00.

22 In light of deficiencies discussed above and the strong policy underlying the
23 Federal Rules of Civil Procedure favoring decisions on the merits, the Court cannot
24 exercise its discretion to grant default judgment.


25 **IV. CONCLUSION**

26 It is therefore ordered that Plaintiff's Third Amended Application for Default
27 Judgment Against Defendant Maite Au Quiroga (dkt. no. 84) is denied without prejudice.

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1 Plaintiff is given leave to bring another motion for default judgment to cure the
2 deficiencies identified in this order, but must do so within thirty (30) days.

3 DATED THIS 21st day of November 2013.

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6 MIRANDA M. DU
7 UNITED STATES DISTRICT JUDGE
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